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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/659,908	09/11/2003	Barbara Ann Kuhns	CWELC.00013	4195

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EXAMINER	
DONOVAN, MAUREEN C	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 01/10/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application N .	Applicant(s)	
	10/659,908	KUHNS ET AL.	
	Examin r	Art Unit	
	Maureen C Donovan	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *06 October 2003*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-21* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-21* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *11 September 2003* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

1. Claims 1-13 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter, which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Claim 1 recites that the liquid fraction should contain 20-100 grams of calcium per gram of pectin; this recitation is further found in the specification on page 9 (line 20). However none of the examples given in the specification meet that calcium requirement. Even if it is assumed that each ingredient making up the liquid fraction is 100% calcium (which would be an erroneous assumption), the liquid fraction of the examples given would either just barely meet the lower end of the calcium requirement range, or still fall short. The state of the prior art is such that calcium requirements with regard to low methoxyl pectin are commonly in the magnitude of milligrams of calcium per gram of pectin. The examiner therefore questions the claim of 20-100 "grams" of calcium, due to the conflicting guidance found in the specification and the state of the art. One of ordinary skill in the art, given what is claimed, would not be able to produce a product commensurate with the working examples provided in the specification. The dependent claims are rejected for fully incorporating the deficiencies of the base claim. For examination purposes only, the claim will be treated as 20-100 "milligrams" of calcium per gram of pectin.

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1. Claims 1,2,3,5,8,13,14,15 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Moirano, US patent number 3,556,810.

Moirano discloses a method for preparing a food sauce the method including the steps of hydrating a low methoxyl pectin in water, mixing a thickener with the pectin, wherein the thickener of Moirano is a locust bean gum, mixing calcium with the pectin and thickener and adding a fruit component to the pectin, thickener, calcium composition (see Column 7, lines 5-22). It is noted that the applicant uses the claim language "comprising" which is open-ended; therefore since Moirano discloses the individual method steps as instantly claimed, the order in which the steps are performed does not distinguish the claimed invention from the reference. In addition, the fact that Moirano discloses incorporating the juice, pectin and thickeners together and heating them together does not distinguish the reference from the instantly claimed invention, due to the applicant's use of comprising language and since the general method steps of hydrating pectin, mixing a thickener in and mixing in calcium are disclosed by Moirano. It is inherent that when the fruit sections of Moirano are added to the mixture as disclosed by Moirano (see Column 7, lines21-22) that the temperature of the mixture would be reduced since the mixture is initially at a higher temperature than the fruit, therefore due to heat transfer when the colder fruit sections were added, the temperature would be reduced. In addition, Moirano discloses reheating after adding the fruit sections are added, indicating that the temperature was reduced. Moirano discloses the use of 10-100mg of calcium per gram of pectin (see Column 5, lines 65-73). Moirano discloses utilizing ratios of thickener to pectin that fall within the instantly claimed range (see Column 4, lines 15-17). Moirano discloses that the pectin solution is maintained at a temperature between 160°F to 190°F (see Column 8, lines 70-72 and Column 7, lines 19-20). Moirano discloses that the pectin containing solution is kept at a temperature above the gelling temperature of the pectin (see Column 6, lines 30-33). Moirano discloses adding other ingredients to the dessert gel, such as sugar (see Column 8, line 17). Moirano discloses that fruits such as pineapple can be used in the composition (see Column 8, lines 51-54). Instant claims12 and 17 are treated as product by process claims. Since Moirano discloses an aqueous dessert gel,

and discloses a method anticipating the methods of instant claims 1 and 14, it is interpreted that Moirano discloses a food sauce as claimed in claims 13 and 19.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* v. *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

2. Claims 4,6,7,10,11 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Moirano as applied to claims 1,2,3,5,8,13,14,15 and 19 above, and further in view of the combination of Braverman, US patent number 4,140,807 and NDSU Extension Service Publication (NDSU).

Moirano discloses that the calcium is dissolved in juice for addition to the pectin and thickener composition (see Column 7, lines 20-21). Moirano also discloses that fruit juice and sections of citrus fruits are used. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used fruit juice concentrate for the fruit juice as disclosed, since fruit concentrate is an aqueous form of fruit juice as Moirano disclosed is needed and since a fruit juice concentrate would have allowed a stronger fruit flavor to be added to the gel composition without adding more water than necessary.

Moirano discloses adding the pectin to the liquid fractions and mixing them together (see Column7, lines 1-30). It would have been obvious to one of ordinary skill in the art at the time of

the invention to have mixed the ingredients together at a rate commensurate with the volume and viscosity of the product in order to have all the ingredients properly mixed and incorporated with each other, and it would have not involved an inventive step for one of ordinary skill to utilize a rate within the range as instantly claimed.

Moirano discloses all the features of the instantly claimed invention except for the use of fruit puree, frozen fruit or xanthan as a thickener.

Moirano teaches the use of locust bean gum, which is a known thickener. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used xanthan gum in the place of the locust bean gum since xanthan gum is a functional equivalent of the locust bean gum as disclosed by Moirano and would have yielded functionally equivalent results.

Braverman taught the use of fruit pulp, puree or concentrate and that the choice of product depends on the flavor requirements of the consumer in a liquid confection product employing low methoxyl pectin (see Column 8, lines 32-45). It would have been obvious to one of ordinary skill in the art at the time of the invention to have used a fruit puree for the fruit components used by Moirano since both are directed to pectin containing fruit confections and since using puree would allow the inclusion of fruit pulp and juice (both of which are used by Moirano) as one product, in order to meet the taste demand of the product consumer as taught by Braverman.

NDSU taught the use of frozen fruits in jam and jelly compositions. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used frozen fruit as taught by NDSU for the fruit sections used by Moirano since both are directed to pectin fruit containing compositions and since NDSU taught that using frozen fruits allows you to make jam of fruits that are no longer in season, adding to the variety of products that can be made at any time (see Page 1, 1st and 2nd paragraphs).

3. Claims 1,9,10,11,14,15,16,17,20 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Uncooked Jam and Jellies by Pamela Brady in view of the combination of Jam Today! With Pomona's Universal Pectin online publication and Food Product Design article by Paula Frank.

Brady disclosed a method for making a no-cook food sauce including the steps of dissolving pectin in water and adding a fruit component to the pectin (see Page 1). It is inherent that when adding the hot pectin composition to the fruit that the temperature is reduced to a point below which cooking of the fresh fruit would occur since this is a no-cook recipe, meaning that the fruit is not cooked. Brady disclosed that frozen fruit can be used and the use of blackberries (see Page 1).

Brady does not disclose using a thickener, a low methoxy pectin or calcium.

Jam Today! disclosed that Pomona's Pectin is a low methoxyl pectin that could be used in place of regular pectin to make sugar-free jams including no-cook jams (see Page 2). Pomona's Pectin disclosed that the pectin is activated by calcium and that calcium is added to the jam to activate the pectin (see Page 1 and Page 3), and is added in the form of calcium water as evidenced by Cathy's Corner publication (see Page 1, 1st paragraph). It would have been obvious to one of ordinary skill in the art at the time of the invention to have used the low methoxyl pectin and calcium of Jam Today! for the jam of Brady in order to make a freezer jam that was sugar-free.

It would have been obvious to one of ordinary skill in the art at the time of the invention to have used an amount of calcium within the claimed range in the invention as disclosed by Brady as modified by Jam Today! since Jam Today! as evidenced by Cathy's Corner publication taught using calcium water to gel the pectin, and it would have been obvious for one of ordinary skill in the art to utilize an amount of calcium within the instantly claimed range in order to obtain a sauce with the desired gel properties, such as viscosity.

Frank taught using a thickener to prevent the fruit in a jam from floating to the top of the product (see Page 3, 3rd Paragraph). It would have been obvious to one of ordinary skill in the art at the time of the invention to incorporate a thickener as taught by Frank in the fruit jam composition as disclosed by Brady as modified by Jam Today! since both are directed to jams and since the thickener would improve the product quality and prevent the fruit from floating to the top of the jam.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims1,2,3,4,6,7,8,9,10,11,13,14,15,16,17,19,20,21 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1,2,3,5,67,8,10,11,12,13,14,15,16,17,18 and 19 of copending Application No. 10/417473. Although the conflicting claims are not identical, they are not patentably distinct from each other because in the instant application methods for the preparation of a food sauce are recited in claims 1, 13 and 18 that encompass the methods of claims 1,14 and 20 of Application No. 10/417473. The instant application does not recite what amount of calcium to use, but it would have been obvious to one of ordinary skill in the art to use a concentration of calcium in order to achieve the appropriate gel consistency desired.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Maureen C Donovan whose telephone number is (571) 272-2739. The examiner can normally be reached on 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

MCD

KEITH HENDRICKS
PRIMARY EXAMINER